UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 1 Article 18

12-1-1956

Criminal Law -- The Sleeping Motorist

Parks Allen Roberts

Criminal Law—The Sleeping Motorist

In the recent case of *State v. Mundy*,[1] the Supreme Court of North Carolina for the first time considered the criminal liability of the sleeping motorist.[2] The defendant, a highway patrolman, went off duty shortly before 4:00 a.m. after eighteen hours' continuous duty. Driving home with two friends the defendant apparently went to sleep allowing his car to run off the the highway into a parked auto. One of his guest passengers was killed in the collision. The defendant was tried and convicted of involuntary manslaughter.[3] In reversing the conviction for an erroneous charge, the Supreme Court stated its position in regard to the criminal liability of the sleeping motorist, saying:

> ". . . [The] mere fact that the operator of a motor vehicle involuntarily goes to sleep while operating his automobile does not, nothing else appearing, constitute culpable negligence. In determining the question of culpable negligence, the focal point of inquiry is whether the operator, because of drowsiness, previous tiring activities, or other premonitory symptoms of sleep, became aware of the likelihood of falling asleep, but nevertheless continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others upon the highway, proximately resulting in injury or death."[4]

The inference from this case is that the court has adopted the test of the majority of the courts in the United States that have considered the question. The majority of the cases state that if the state only proves the act of falling asleep while driving a motor vehicle, a nonsuit

[1] 243 N. C. 149, 90 S. E. 2d 312 (1955).

[2] The number of cases involving the sleeping motorist has constantly increased since the invention of the automobile. During the years 1900 to 1919, there was only one decision considering the liability of the sleeping motorist. However, this number increased to 40 cases from 1940 to 1949. Kaufman and Kantrowitz, *The Case of the Sleeping Motorist*, 25 N. Y. U. L. Q. REV. (1950). In 1948, approximately 4 per cent of the deaths resulting from automobile accidents throughout the United States were attributed to the driver falling asleep or becoming unconscious. ACCIDENT FACTS (National Safety Council 1948). In North Carolina during 1955, the sleeping motorist was involved in slightly more than 3 per cent of the fatal accidents, or 32 fatal accidents and 651 accidents. NORTH CAROLINA ANNUAL MOTOR VEHICLE ACCIDENT SUMMARY (1955).

[3] The court in State v. Whaley, 191 N. C. 387, 389, 132 S. E. 6, 8 (1926) said, "The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessess or carelessness as is incompatible with a proper regard for human life. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

[4] State v. Mundy, 243 N. C. 149, 153, 90 S. E. 2d 312, 315 (1955).

for defendant would be proper.[5] Therefore, a driver who while asleep has driven his automobile so as to kill someone is not guilty of negligent homicide unless he had such warning of falling asleep that under all the circumstances he drove recklessly or in marked disregard of the safety of others and such driving was the proximate cause of the death.

However in *State v. Olsen*,[6] the Utah Supreme Court took a contrary view. In this case the court held that the fact of going to sleep while driving an automobile, without more, at least presents a question for the jury as to whether the driver was negligent and that the jury could find that the defendant, in allowing himself to go to sleep, was guilty of negligence manifesting a marked disregard for the safety of others on the highway. The significance of this case is that upon the state proving that the defendant went to sleep, the defendant must come forward with evidence to show that he did not have any prior warning of going to sleep or else take the chance that the jury may find him guilty of involuntary manslaughter.

Involuntary manslaughter in North Carolina is based on culpable negligence, which is such conduct that evinces a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others.[7] Although the above rule is not controlling in civil actions, it may aid the treatment of this problem to see how the courts have treated the sleeping motorists in civil cases involving negligence.

The cases of *Baird v. Baird*[8] and *Hobbs v. Queen City Coach Co.*[9] seem to give a good indication of the civil liability of the sleeping motorist in actions based on ordinary negligence in North Carolina. The cases indicate that the Supreme Court of North Carolina will adopt the majority rule in the United States. The majority rule is that if in an action based on ordinary negligence, the plaintiff proves that the defendant went to sleep while driving, that fact alone justifies an inference of ordinary negligence sufficient to make out a prima facie case and make it a question for the jury.[10]

In *Baird v. Baird* the court applying the law of New York, because the accident occurred there, could find no New York case dealing with this question but found the applicable law in a case dealing with a sleeping passenger. The court said:

[5] Johnson v. State, 148 Fla. 510, 4 So. 2d 671 (1941); People v. Robinson, 253 Mich. 507, 235 N. W. 236 (1931); Novesky v. Mac Duff, Commissioner of Motor Vehicles, 280 App. Div. 953, 116 N. Y. S. 330 (1952); State v. Champ, 172 Kan. 737, 242 P. 2d 1070 (1952); *In re* Lewis, 11 N. J. 217, 94 A. 2d 328 (1952).

[6] State v. Olsen, 108 Utah 377, 160 P. 2d 427 (1945).

[7] See note 3 *supra*.

[8] 223 N. C. 730, 28 S. E. 2d 225 (1943).

[9] 225 N. C. 323, 34 S. E. 2d 211 (1945).

[10] See Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); which is apparently the leading case in the United States on civil liability of the sleeping motorist. See also 28 A. L. R. 2d 1, 45 (1953).

> "Ordinarily, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, and it lies within his own control to keep awake or to cease from driving, and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case against him for injuries sustained by another while so driving and sufficient for a recovery if no circumstances tending to excuse or justify his conduct are proven."[11]

Although this statement was dictum in the case and the court expressly said that this decision would not be binding upon later cases in North Carolina, it seems to be a sound inference that the court would adopt such a rule when faced with a case involving the liability of the sleeping motorist based on ordinary negligence.

This inference is strengthened by the case of *Hobbs v. Queens City Coach Co.* where the driver of a bus ran out of his lane of traffic thereby running into the automobile of the plaintiff who was in his proper lane. After the accident the driver remarked that he must have fallen asleep. Although the court made no direct statement that sleeping while driving a motor vehicle was negligence, it did say that it was a general rule of law that operators of a motor vehicle must exercise the care which an ordinary prudent person would exercise under similar circumstances. The court went farther to say that in the exercise of such duty it is incumbent upon the operator to be reasonably vigilant. Although the court did not speak the word "sleep" in this statement, its relationship to vigilance will be clarified by referring to the statement in *Baird v. Baird,* where the court said that ordinarily one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires. Therefore it is a logical inference that the court in speaking of the operator having a duty to be reasonably vigilant, meant that a person has a duty to keep awake while driving a motor vehicle and proof that he went to sleep is an inference of negligence without showing more.

The court in *Baird v. Baird,* explains the rationale of this rule by saying:

> "The approach of sleep, 'tired nature's sweet restorer,' is usually indicated by certain premonitory symptoms, and does not come upon one unheralded. His negligence, if any, lies in the fact that he does not heed the indications of its approach or the circumstances which are likely to bring it about."[12]

[11] Baird v. Baird, 223 N. C. 730, 732, 28 S. E. 2d 225, 227 (1943).
[12] *Id.* at 732, 28 S. E. 2d at 227.

In view of this the test would seem to be whether the defendant was negligent in permitting himself to fall asleep in the first place. This logic would be in accord with the reasoning of the well-settled rule that one who is involved in a collision due to sudden paralysis or unexpected epileptic seizure is not negligent.[13] It would follow that one overcome by sleep without warning could not be said to be negligent, but it should be up to him to prove that he did not have any warning.[14]

Some of the most frequent circumstances said to impute warning of sleep by other states are: (1) lack of sleep; (2) length of time at the wheel; (3) presence of premonitory symptoms (frequent yawning, drowsiness, prior napping); and (4) driving under the influence of liquor.[15]

North Carolina is not concerned with different degrees of negligence as are other states with guest statutes. However, in *Farfour v. Fahad*,[16] our court, interpreting the law of Virginia which requires gross negligence, followed the majority rule as to gross negligence. It held that the mere falling asleep while driving does not give rise to an inference of gross negligence necessary to make a prima facie case.[17] The majority of cases requiring a finding of wilful and wanton negligence apparently apply the same rule.[18] The court unaminously agreed that the driver of an automobile who falls asleep while driving is grossly negligent if he had some *prior warning* of the likelihood of his going to sleep. Therefore, if the plaintiff in an action based on gross or wilful and wanton negligence shows merely that the operator of the motor vehicle fell asleep while driving, a directed verdict for the defendant is proper. Most of the cases of the sleeping motorist involving gross and wilful and wanton negligence come up in states having guest[19] statutes which require gross or wilful and wanton negligence for liability.[20]

[13] 1 VARTANIAN, THE LAW OF AUTOMOBILES IN NORTH CAROLINA, 85 (3d ed. 1947). Also see Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925) for the medical basis for the rule.

[14] In forecasting what the Supreme Court of North Carolina will do in cases involving civil liability of the sleeping motorist in actions based on ordinary negligence, it is interesting to note that no case has been found in which the operator of a motor vehicle who fell asleep has been absolved of liability in an action based on ordinary negligence, unless there were other circumstances to relieve the defendant of liability. 5 AM. JUR., AUTOMOBILES § 180 (1956 Supp.).

[15] See 28 A. L. R. 2d 1 §§ 26, 27, 28, 29 (1953).

[16] 214 N. C. 281, 199 S. E. 521 (1938).

[17] *Id.* at 287.

[18] For example, see Covington v. Carley, 197 Miss. 535, 19 So. 2d 817 (1947) applying the law of Alabama; Phillips v. Harper, 60 Cal. App. 2d 298, 140 P. 2d 686 (1943); Secrist v. Raffleson, 326 Ill. App. 489, 62 N. E. 2d 399 (1941); Butine v. Stevens, 319 Mich. 176, 29 N. W. 2d 325 (1947).

[19] A "Guest" in an automobile is one who takes ride in automobile driven by another person, merely for his own pleasure or on his own business, and without making any return or conferring any benefit to the automobile driver. BLACK, LAW DICTIONARY (4th ed. 1951).

[20] Statutes which relieve the owner or operator of a motor vehicle of liability for injury to a guest unless he has been grossly negligent or wilful or intentional

Continuing to drive under the following conditions which resulted in falling asleep have justified a finding of gross or wilful and wanton negligence; (1) drinking of intoxicating beverages; (2) prior warning, refusal of relief; (3) excessive length of time at the wheel; and (4) statutes limiting driving time.[21]

While the threat of civil liability serves as a deterrent to drivers falling asleep while driving, a look at accident statistics indicates that more extreme measures should be taken. Since the Supreme Court of North Carolina apparently has adopted the rule as set out in *State v. Mundy* regarding criminal liability, this writer would like to see the legislature pass a statute similar to a recent Michigan statute.[22] Although this statute does not speak expressly of sleeping at the wheel, it does make negligence of a lesser degree than wilful and wanton, resulting in death, a misdemeanor. Thus, if the rationale inferred in *Baird v. Baird* and *Hobbs v. Queen City Coach Co.* is followed, the state could get a conviction under this statute by proving the fact of falling asleep alone without more. Such a measure should have some effect in reducing highway fatalities.

PARKS ALLEN ROBERTS

Descent and Distribution—The Right of a Prospective Heir to Release or Assign an Expectancy

During his lifetime, deceased entered into an agreement with four of his eight children whereby in consideration of $6,000.00 paid to each of them by him they released all interest and right of inheritance in his estate. After the death of the deceased, the administrator of the estate brought an action in which he sought to have the court rule upon the legal effect of the instrument purporting to be a release. The North Carolina Supreme Court unanimously held that the release was binding and enforceable in equity if fairly made upon a valuable consideration

misconduct have been enacted in many states. These are commonly denominated "guest" statutes. Certain things may amount to gross negligence or wilful and wanton misconduct within the meaning of the guest statutes. Whether or not there is such negligence as the statute requires is ordinarily a question for the jury. With its conclusion the courts do not ordinarily interfere. 5 AM. JUR., *Automobiles*, 237, 240 (1933). Also see cases cited note 18 *supra*.

[21] For example, see Belletete v. Morin, 322 Mass. 214, 76 N. E. 2d 660 (1948); Oast v. Mopper, 58 Ga. App. 566, 199 S. E. 249 (1938); Smith v. Williams, 180 Ore. 232, 178 P. 2d 710 (1947); Masters v. Cardi, 186 Va. 261, 42 S. E. 2d 203 (1947).

[22] MICH. STAT. ANN. c. 286a, § 28.556 (1954), which reads: "Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a [misdemeanor] punishable by imprisonment in the state prison not more than two years or by a fine of not more than $2,000.00. . ." Also see 49 Cal. Code, Penal § 500 (1956); Kan. Gen. Stat. § 8-529 (1947).